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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 708

FANCHON & MARCO, INC., *Petitioners*,

v.

PARAMOUNT PICTURES, INC., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fanchon & Marco, Inc., prays that a writ of certiorari issue to review the judgment entered in this case on November 1, 1951, by the United States District Court for the Southern District of California.

OPINION BELOW

The opinion of the district court is printed at Record p. 123, and is reported at 100 F. Supp. 84.

JURISDICTION

The judgment of the district court was entered on November 1, 1951, and an appeal was taken to the Court of

Appeals on January 5, 1952, where the case is now pending.

The jurisdiction of this Court is based on section 1254 of the Judicial Code. (28 U.S. C.A. sec. 1254.)

QUESTIONS PRESENTED

1. In a private suit under the antitrust laws, in which judgments in a government suit have been received in evidence under section 5 of the Clayton Act, may the district court give to the judgments no real evidentiary value or effect, and correctly decide that the facts of which they are evidence have been overcome and rebutted by evidence of the defendants which is of no factual or legal weight or significance whatever?

2. May a district court in such a case correctly decide that the prima facie effect of such judgments is overcome and negatived merely by general denials of employees of the conspirators who have no knowledge of and have not been participants in the conspiracy?

3. May a district court decide that the prima facie effect of such judgments is overcome and negatived merely by such denials and by a presumption that the defendants discontinued the conspiracy upon entry of the judgments?

4. Does a presumption arise that defendants in a government antitrust suit have discontinued the practices, acts, ownerships and relations prohibited by judgments entered against them, upon entry of the judgments?

5. Does such a presumption arise where the practices, acts, ownerships and relations, or some of them, are not required to be discontinued until long after the entry of the judgments?

6. Whether it is clearly erroneous for a district court to decide that conspiracy and monopolization have ceased to be the cause of restraint of trade and monopoly upon the entry of such judgments, and that individual action has then become the cause, where precisely the same practices,

acts, ownerships and relations have continued without interruption?

7. Whether conspiracy AND unreasonableness AND injury must concur and be shown in a private antitrust suit, where the defendants have unaminously refused to deal with the plaintiff, on the theory that the refusals are necessary on so-called economic and business grounds?

STATEMENT

Petitioner is engaged in the operation and management of motion picture theatres in Los Angeles.

The respondents are:

1. Paramount Pictures, Inc.,
2. Paramount Film Distributing Corporation,
3. Loew's, Incorporated,
4. RKO Radio Pictures, Inc.,
5. Universal Pictures Company, Inc.,
6. Universal Film Exchanges, Inc.,
7. United Artists Corporation,
8. Twentieth Century-Fox Film Corporation,
9. National Theatres Amusement Co., Inc.,
10. Fox West Coast Theatres Corporation.

Respondents Paramount, Loew's, RKO and Fox, with Warner Bros. Pictures, Inc. (which is not a respondent), are the so-called five major motion picture distributors. Together with respondents Universal and United Artists, and Columbia Pictures Corporation (Columbia also is not a respondent), they control and release eighty per cent or more of the feature motion pictures, a substantial part of which is needed to run any motion picture theatre in the United States. National Theatres and Fox West Coast Theatres are engaged in operating motion picture theatres.

On August 10, 1949, petitioner began the operation of a large, newly constructed motion picture theatre at Los Angeles, called the Baldwin theatre. Prior to the opening of

the theatre petitioner made requests of each and all of the eight picture distributors, including respondents, to license feature pictures for first run use with which to open the theatre. (R. 135) All refused. From time to time thereafter until shortly before the trial of this case in 1951, petitioner continued its efforts to procure pictures from the distributors for first run use in the theatre. Every request was denied. The distributors also unanimously refused to license pictures for the theatre except for second run exhibition, subject to a clearance of twenty-one days in favor of the first run exhibitors in the Los Angeles area.

Even though petitioner offered Columbia $250,000 for the picture "Jolson Sings Again," to be played first run in four theatres, including the Baldwin, with seating capacity of 8,290, it was refused, despite the fact that Columbia considered the managerial ability and financial responsibility of petitioner good. Instead, the picture was licensed to RKO for first run showing in two RKO theatres, with but 5,700 seats. The film rental received was much less than $250,000. (R. 175-176, 3461, 3475-3478.)

On May 8, 1950, petitioner filed suit against respondents in the District Court at Los Angeles, and complained that the refusals were pursuant to conspiracy and monopoly in violation of the antitrust laws, and sought an injunction against the refusals and damages resulting from the past deprivation. (R. 3) After a trial without a jury, the complaint was dismissed by judgment entered November 1, 1951. (R. 201-202.) On January 5, 1952, the judgment was appealed to the Court of Appeals for the Ninth Circuit, where the case is now pending.

On April 24, 1952, in *Chorak* v. *RKO*, 196 F. 2d 225, the Court of Appeals approved the decision of the district court in this case, by affirming largely on the basis and citation of that decision, a judgment erroneously upholding a similar unanimous refusal of the respondents to furnish pictures for the theatre of an independent exhibitor. In the *Chorak case* certiorari was denied by this Court on No-

vember 17, 1952, Justices Reed, Black and Douglas dissenting, 73 S. Ct. 186.

There are about 300 theatres in the Los Angeles area, which represent the market for the leasing of pictures from the distributors. About 214 of the theatres are located in Los Angeles proper.

Only for theatres owned by corporations controlled by respondents have licenses for the first exhibition of pictures at Los Angeles been granted by the distributors. This limitation, which began long before the entry of the judgments in the *Paramount Case*, 334 U. S. 131, hereinafter referred to, continued and existed without change at the time of the trial of this case.

There were about thirty-three theatres in this preferred group, distributed in ownership as follows: Fox Film, through control of Fox West Coast Theatres, from 22 to 24 theatres; Warner, three; RKO, two; United Artists, two, and Paramount, two. (R. 175-176, 184, 575-581)

As stated by this Court in *United States* v. *Paramount*, 334 U. S. 131, 167, the first runs yield the "cream" of the business; and in Los Angeles about two-thirds of the total admissions are received by the first run theatres.

Of all the theatres in the Los Angeles area, first and subsequent run, about 250 were controlled by respondent Fox West Coast Theatres. (R. 127) The rest of the subsequent run theatres were scattered among many independent exhibitors.

For theatres in the Los Angeles area, the distributors for many years have enforced a classification as to the run for which each shall receive pictures (as on first run, second run and so on), and as to the clearances appertaining to the several runs. Few, if any, of the theatres, except those of respondent Fox West Coast, have received pictures for any run better than that for which it has been classified.

In the system of classification, three clearances have applied in favor of the first run against the second run theatres—7, 14 and 21 days. Theatres which received second

run pictures were further grouped on the basis of clearance, some theatres being classed as subject to the 7 days clearance, others to 14 days, and still others to 21 days. Except as to the theatres of Fox West Coast, no theatre placed in a particular position as to run has received pictures from any of the distributors on any better basis, and seldom on any other basis. No theatre except those constructed or acquired by Fox West Coast has moved from an inferior into the first run position.

The system of classification was accompanied by a structure of fixed admission prices for all of the theatres, which were substantially uniform for all theatres in the same run and substantially uniform in differentials between the runs, enforced by the distributors by specifying in their licenses of pictures the minimum prices to be charged by the exhibitors, on pain of immediate termination of the license, reduction in the clearance allowed, relegation of the offending exhibitor to a later run, and refusal of future licenses.

By this process of classification and regimentation of theatres for runs, clearances and admission prices, the Baldwin, although the newest, most modern, spacious and comfortable motion picture theatre in the area, was unanimously denied pictures for first run use and relegated to a second run, subject to 21 days clearance. Upon being denied licenses for first run pictures, petitioner sought to license pictures for second run on 7 days clearance; and, being unanimously denied that, sought the 14 days clearance, which also was unanimously denied. (R. 188-192)

The regimentation of theatres on runs, clearances and admission prices, and the preemption by theatres of the major distributing companies of the first run use of pictures, in the Los Angeles area, was a continuation of the very same conspiracy and monopolization held to be violative of the antitrust laws by this Court in *United States* v. *Paramount*, 334 U. S. 131.

Five final judgments entered against the defendants in that case, were introduced by petitioner as prima facie evi-

dence in support of its complaint, under section 5 of the Clayton Act. The judgments were as follows:

1. A judgment against all respondents, dated December 31, 1946. (Ex. 41, R. 1641; printed also in 70 F. Supp. 72.)

2. A final judgment against the RKO defendants in the government suit, dated November 8, 1948. (Ex. 45, R. 1621.)

3. A final judgment against the Paramount defendants, dated March 3, 1949. (Ex. 46, R. 1621.)

4. A final judgment against Universal Pictures Company, Inc., and Universal Film Exchanges, Inc., dated February 8, 1950. (Ex. 49, R. 1621)

5. A final judgment against Loew's, dated February 8, 1950. (Ex. 48, R. 1541-1542, 1621).

A final judgment against the Fox defendants in the government suit was not entered until June 7, 1951, five days before the start of the trial of this case, and was not in evidence. It prohibits restraint of trade practices and makes extensive theatre divestiture requirements, but in general, gives two years for the divestitures. (CCH 1950-1951 Trade Cases, paragraph 62, 861.)

The district court in this case also received in evidence, as showing more fully the matters adjudicated in the government case, the findings of fact in that case, dated February 3, 1947, and February 8, 1950, as well as the opinion of this Court. (Exs. 41, 42, 43, 44, 47, R. 1536, 1538, 1621; 70 F. Supp. 53; 334 U. S. 131.) Such use of the findings, etc., was approved in *Emich* v. *General Motors*, 340 U. S. 558.

In the *Paramount case* the district court found that respondents had conspired to restrain trade on a nation-wide scale in the distribution and exhibition of motion pictures, and upon those findings entered a judgment prohibiting certain practices by which the conspiracy had been effectuated. The district court, however, denied additional relief requested by the government, namely, that the picture distributing and exhibition businesses of respondents should be separated. But this Court reversed the judgment as to

that denial, and remanded the case for further action on divorcement.

In further proceedings thereupon had by the district court, it received and considered additional evidence on the subject of theatre ownership and divorcement, including evidence relative to changes which had occurred since 1945. The court then found, amongst other things, that the major distributors had extensive theatre holdings throughout the United States, that in cities with over 100,000 population they controlled at least 70 percent of all first run theatres, and in Los Angeles they were most predominantly in control of the first run theatres. (Ex. 47, findings, 147(e), 148.)

Further, the court found that the control of theatres played a vital part in effecting the violations of law, that monopoly power was derived from the theatre control, and actually existed, with the intent and actual exercise thereof to exclude competition; that the theatre control, called vertical integration, was a means of carrying out and powerfully aided the conspiracy to fix runs, clearances and admission prices; and that the predominant position of the major distributors in first run theatres was strongly protected by the system of runs and clearances. (Ex. 47, findings 43(a), 85, 147(a)(b)(d), 148(e)(f)(g)) Some of the specific findings on the subject are as follows:

> The theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Antitrust Act. (Finding 43(a))
>
> The fixed system of runs and clearances which involved a cooperative arrangement among the defendants was also designed to protect their theatre holdings, safeguard the revenue therefrom, and eliminate competition. The major defendants' predominant position in first-run theatre holdings was strongly protected by a fixed system of clearances and runs. The power to fix clearances and runs which existed and was exercised by the major defendants was in itself a power to exclude independents who were competitors, and was accompanied by actual exclusion. (Findings 85)

All the defendants entered into a horizontal conspiracy to fix prices, runs and clearances which was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integration an active aid to the conspiracy. Vertical integration has furnished an incentive for such conspiracy. (Finding 147(a))

There is close relationship between the vertical integrations and the illegal practices. The vertical integrations were a means of carrying out the restraints and conspiracies. (Finding 147(b))

The percentages of first run theatre ownership and domestic film rentals controlled by the major defendants when coupled with the strategic advantages of vertical integration created a power to exclude competition from the distribution and exhibition markets when desired. (Finding 148(e))

There is substantial proof that monopoly power existed among the eight distributor-defendants who were all working together. Considering that the vertical integrations aided the horizontal conspiracy mentioned in Finding 147(a) at every point, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market by major defendants' theatre holdings. (Finding 147(d))

This power might be exercised either against nonaffiliated exhibitors or distributors, for the ownership, of what was generally the best first run theatres coupled with the possession by the defendants of the best pictures, enabled them substantially to control the market in first run pictures. (Finding 148(f))

There is substantial proof that the intent to exercise the monopoly power existed among the defendants. (Finding 148(g))

As to runs, clearances and admission prices, the judgments in the government case were evidence of the facts found by the court in that case, and that respondents had acted in concert in the formation on a nation-wide scale, including Los Angeles, of a fixed and uniform system of runs, clearances and admission prices for the theatres to which they licensed their films; that independent exhibitors, like

petitioner, when attempting to bargain with respondents for pictures, were met by a fixed scale of clearances, runs and admission prices to which they were obliged to conform; that the system of runs and clearances was designed to protect the theatres of respondents, safeguard their revenue therefrom, and eliminate competition; that the system gave respondents a practical control over the run and clearance status of any theatre, and involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres; and that the purpose and effect of the system was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but solely upon the basis of whether it was operated by one of the respondents. (Ex. 47, findings 79-85(a), 140; Ex. 45 and 46, paragraph 9, R. 3421.)

The district court in the government case then found that—

> Effective relief from the monopoly power of and its exercise by the major defendants cannot be obtained without divorcement. No adequate competition among the defendants or between defendants and independents can exist in the presence of interdependency among the defendants on the one hand to obtain pictures for their own theatres and on the other to obtain theatre outlets for their own pictures. Divorcement is necessary to prevent the major defendants from being in a state of interpendence which too greatly restricts competition. Divorcement is a necessary remedy to introduce competition into defendants' system of fixed admission prices, clearances and runs, and to remove a major incentive to discriminatory trade practices. (Ex. 47, finding 156(b))

On the basis of these findings, judgments requiring divorcement of theatres were from time to time entered by

the district court as to individual groups of the defendants, including respondents. Some of those judgments are enumerated above, page 7.

No divorcement by respondents of the theatres held by them in Los Angeles had occurred prior to the refusals of the distributors to license first run pictures for the Baldwin theatre during 1949 and 1950. The RKO combination throughout the country and as to the Los Angeles theatres was in existence as recently as January 1, 1951, although the divorcement judgment was entered November 8, 1948. (Ex. 45, R. 175-176) The judgment for the Warner divorcement entered January 4, 1951, does not require divorcement before two years thereafter. (CCH 1950-1951 Trade Cases, paragraph 62,765.) The judgment for the Fox divorcement was entered June 7, 1951, but does not require divorcement before two years thereafter. (CCH 1950-1951 Trade Cases, paragraph 62,861.)

The Fox combination, of which respondent Fox West Coast Theatres Corporation was a part, was the second largest aggregation of theatres and the second largest licensee of motion pictures in the United States. It operated 709 theatres throughout the country. (Ex. 42, R. 1535, 1536; *United States* v. *Paramount,* 334 U. S. 131, 150, 167.) About 160 of these were operated in the Los Angeles area by Fox West Coast Theatres. (R. 1207, 1341, 1380, 1382, 2058, 2088.) Fox West Coast was incomparably the largest renter of films in the area, before and during the time laid in the complaint and at the time of trial of this case. Of the total film rental received by four respondents during 1949-1950 from the Los Angeles area, Fox West Coast paid approximately 36 percent—$6,200,508. Information as to the other four distributors is not contained in the record.

From time to time during the trial of this case, the district judge made the following statements, among others of like import: the "antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern in-

dustrial system"; "this business, by its very nature, is monopolistic"; "free trade would destroy the industry, because it would destroy the man who makes the pictures, regardless of who gets them"; "I don't conceive that there can be possibility of free trade as to first runs" and "Indeed, a system of 'free trade', as I called it during the trial—i.e., a system which would enable anyone to bid on the same conditions for a first-run would result in a monopoly for those paying the highest prices." (R. 131, 137, 802, 874, 1022, 1707, 1711, 1721, 2235, 2236, 2238, 3978.)

In his written opinion the district judge stated that to recover petitioner must show that the restraint was conspiratorial AND unreasonable. He stated the rule for decision as follows:

> So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination . . . and (c) that he has been damaged by such action. (R. 132)
>
> In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of concert of action, and are unreasonable. (R. 134-135; see also R. 802, 874, 1711, 2235-2236, 2388.)

The district judge found that the method of distributing motion pictures disclosed by the evidence was economically necessary and reasonable, i.e., "Such method of distributing motion pictures is reasonable and economically necessary", and "It is economically necessary and is reasonable for a distributor to limit the number of theatres which are licensed to play Los Angeles area first run". (R. 179-180) He found, specifically, that the limitation of first runs to the theatres of respondents was "reasonable" in each case (R. 182-185); that the limitation by Fox of licenses for first run and other preferential use of pictures distributed by it to Fox West Coast Theatres was "reasonable" (R. 188); and

that the control of theatres by Fox West Coast in the Los Angeles area did not constitute a monopoly, i.e.:

> Fox West Coast, through subsidiary corporations, owns and operates a large number of theatres in the Los Angeles area, which theatres are licensed pictures for exhibition on various runs, from first run to late subsequent runs. Such ownership and operation of such theatres does not constitute a monopoly or an attempt to monopolize the exhibition of motion pictures in the Los Angeles area on the part of Fox West Coast (R. 196)

The district court found that the almost perfectly uniform and unanimous action of the distributors, especially in the limitation of first runs to their controlled theatre corporations, and the denials of first run for the Baldiwn theatre, was not the result of conspiracy, but the result of of each individually reacting in a similar manner to general economic and business requirements, and to similar and identical situations. (R. 140-141, 158, 187, 192, 194.) But the economic and business requirements and similar and identical situations were not specifically found or enumerated in the findings or opinion.

While finding that respondents unanimously and contemporaneously refused pictures for first run at the Baldwin theatre, or for second run subject to seven days clearance, or subject to fourteen days clearance, and unanimously granted licenses for twenty-one days clearance, the district court held that the unanimous action as evidence of conspiracy was fully rebutted by general denials of the conspiracy. The court said (R. 134, 135):

> In determining the matter after a complete trial, the question of the burden of proof and of inferences from similar actions becomes academic.
>
> * * * * * * *
>
> Inferences from similarity loses its importance when met by positive denials of such action.

The denials referred to were those of sales employees of Fox, Paramount, and Columbia, who testified merely that they, personally, had no discussion or talk with any other company in determining the run and clearance to which the Baldwin theatre was relegated. (R. 3617, 3467, 3468, 2866)

No attempt was made by respondents to rebut the facts established prima facie by the judgments. The evidentiary effect of the judgments was deemed by the district court to have been overcome by a presumption that the conspiracy of which they were prima facie evidence terminated upon the entry of the judgments. (R. 671-672, 2283-2284, 3072.) The court described that presumption as an "inference that a person against whom a decree has been directed has complied with it, on the assumption that people comply with orders of court. So because of that assumption, therefore, the defendants are entitled, until the case is entirely concluded, that no inference can be drawn of a continuance of facts from their existence then". (R. 677-678, 1597.) Again, "That presumption is that a man follows the law, and that if a man has been under the interdiction of a court, the presumption is that he obeyed the interdiction" (R. 2284).

> I remind you that you are not before the court charged by the government with violating the decree, so you do not have to exculpate yourself. I assume you are entitled to the presumption of innocence and fair dealing, and you are entitled to the presumption that you have complied with the decree. (R. 3072)

Petitioner, through a corporation of which it held all the stock, was until March 17, 1952, the lessee and operator of one of the Paramount first run theatres. It also owned a fifty percent stock interest in another corporation which leased and operated another Paramount first run theatre, located in Hollywood. Petitioner was the only independent exhibitor in the Los Angeles area having any interest in any degree in the first run business.

Partmar Corporation, of which petitioner held all the stock, leased one of the theatres from respondent Para-

mount, and licensed Paramount pictures for first run showing in the theatre. On March 26, 1947, prior to the expiration of the lease, Paramount demanded that Partmar vacate the theatre, and refused any longer to furnish pictures under a contract to expire contemporaneously with the lease. On May 1, 1947, Paramount filed suit to evict Partmar, on the theory that eviction was permissible because of Paramount's own violation of the antitrust laws, as decided in *United States* v. *Paramount*, 66 F. Supp. 323, 70 F. Supp. 52, 334 U. S. 131. The district court, however, denied eviction and held the picture contract had been unlawfully terminated. The opinion in that case is reported in *Paramount* v. *Partmar*, 97 F. Supp. 552. The lease and the picture licenses imposed very heavy theatre and film rental payments on the tenant, based on percentages of the gross receipts of the business, leaving but a very small fraction of the profits to the tenant. The only relationship between the tenant and respondent Paramount was that of landlord and tenant and licensor and licensee of the pictures. On expiration of the lease the tenant surrendered possession, and the theatre and the business were taken over by Paramount. On March 4, 1953, Partmar Corporation filed a petition for certiorari (No. 641) relative to an action under the antitrust laws concerning that transaction.

In 1942 petitioner induced Paramount to furnish pictures for the first run theatre to be located in Hollywood. Paramount was unwilling to do this, however, unless it were given a large ownership in and control of the enterprise. Accordingly, a corporation was organized called Paramount Hollywood Theatre Corporation, and the stock was equally divided between petitioner and respondent Paramount; a theatre was leased by the corporation and Paramount made a contract to furnish pictures for first run use in the theatre to expire in September 1951; and the theatre opened in March 1942. (R. 783, 808, 1310, 1384-1385; Ex. F.) The theatre was operated by petitioner under a contract for management. In March 1947 Paramount also cancelled the

contract for furnishing pictures for that theatre. The judgment in the government case against Paramount (Ex. 46), required Paramount to make a divestiture of the stock held by it in the Paramount Hollywood Theatre Corporation as a means of liberating the corporation from the unlawful control, but as of this time (April 1953) the divestiture has not been made. See *Fanchon & Marco* v. *Paramount*, — F. 2d ——, CA 2, decided March 9, 1953. The only relationship between petitioner and Paramount in this enterprise was that of co-stockholder in Paramount Hollywood Theatre Corporation.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the district court in this case is in conflict with the opinion of this Court in *United States* v. *Paramount,* 334 U. S. 131. The findings and opinion show that in the Los Angeles area the major picture distributing companies as late as the trial of this case in 1951 were continuing to practice the same system of runs, clearances and admission prices, and allocation of pictures among the exhibitors, the same control of the first run theatres, the same preferential licensing of first run pictures to those theatres and the same discrimination against independents, which were found by the district court and this Court in the *Paramount case* to exist on a nationwide scale, and to be the result of conspiracy.

On facts almost precisely identical with those in the *Paramount case,* the district court in this case has reached a decision precisely the opposite of that in the *Paramount case.* The only difference is one of time, in that this case presents an instance of the application of the same conspiracy to petitioner beginning in 1949, shortly after the decision of this Court in May 1948, and even before the proceedings in the district court on the mandate of this Court had been concluded.

The opinions in the *Chorak case,* 196 F. 2d 225, and in the present case, are the only reported decisions of the Los Angeles district court and of the Court of Appeals for the Ninth Circuit, in motion picture treble damage and injunction cases. The opinion in this case has become a leading authority in the Ninth Circuit, although not an opinion of the Court of Appeals but of the district court, because the Court of Appeals in its opinion in the *Chorak case* has approved and largely used this case as the basis of its own decision.

A decision precisely the reverse of that of this Court in the *Paramount case* was reached in this case by the district court (1) by attributing little or no effect or weight to the judgments in the *Paramount case* as evidence of the

fact that the practices and restraints were the result of conspiracy, (2) by using the judgments to create a supposed presumption that the conspiracy of which they were evidence had been discontinued, (3) by inferring the non-existence of conspiracy from general denials, (4) by inferring that the same uniformity of action among respondents was the result of respondents individually reacting in the same manner to similar economic and business conditions, (5) by concluding that the general denials and the uniformity of action negatived the prima facie effect of the judgments and all the other evidence in the case, and (6) by holding that petitioner could not recover unless the unanimous refusals to furnish pictures were conspiratorial *and* unreasonable *and* injurious to it.

Presumption of discontinuance of conspiracy. Not only has the district court in applying such a presumption robbed petitioner of the real evidentiary effect of the judgments that the conspiracy existed, and of the presumption of its continuance, but it has used the judgments as the basis of a contrary presumption. This not only nullifies the purpose of section 5 of the Clayton Act "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich* v. *General Motors,* 340 U. S. 558, 568), but in this case has actually inverted section 5 of the Clayton Act and turned the judgments against the injured private suitor.

There is no presumption that upon the entry of a judgment favorable to the government in an antitrust case, the defendants thereupon ceased their unlawful conduct.

A conspiracy, once established, is presumed to continue until the contrary is shown.

Marino v. *United States,* 91 F. 2d 691, 695, CA 9, 1937.
Coates v. *United States,* 59 F. 2d 173, 174, CA 9, 1932.
Hyde v. *United States,* 225 U. S. 347.

A judgment that parties have violated the antitrust laws does not create a presumption that they have ceased the violation.

Local 167 v. *United States*, 291 U. S. 293, 1934.

In *Local 167*, the defendants in a suit for injunction under the antitrust laws, relied upon a judgment in a preceding criminal prosecution for engaging in the same conspiracy as evidence that they had abandoned the conspiracy before the commencement of the injunction suit. The refusal of the trial court to impute any such effect to the former judgment was affirmed. This Court said (pp. 297-298):

> The conspiracy was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection, and expenditure of enormous sums. In the absence of definite proof to that effect abandonment will not be presumed.

Conspiracies in restraint of trade, and especially those like that in *United States* v. *Paramount*, are essentially continuous in nature. As said in *United States* v. *Kissel*, 218 U.S. 601, 607-608, 1910:

> A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success.

Unbroken continuity of unlawful restraint and monopoly practiced by respondents for at least the last twenty-five years, is evidenced by numerous proceedings under the antitrust laws, instituted by the government in repeated efforts to enforce competitive conditions in the motion picture business, as well as by private parties to recover damages and injunctive relief. This record of conduct refutes the presumption indulged in by the Trial Judge that the re-

spondents have "obeyed" the interdiction either of the statute or of the judgments, and shows them to be and to have been for many years, incorrigible violators.

A partial list of these proceedings is as follows:

1928— 1. *United States* v. *Paramount Famous Lasky Corp.*, 282 U.S. 30.
1928— 2. *United States* v. *First National Pictures, Inc.*, 282 U.S. 44.
1928— 3. *United States* v. *Balaban & Katz Corp.*, Equity No. 8854, District Court of the United States, Northern District of Illinois, December 15, 1938.
1929— 4. *United States* v. *Fox Theatres Corp.*, S.D. N.Y. Eq. 51-122; consent decree 1931.
1930— 5. *United States* v. *West Coast Theatres, Inc.*, S.D. Cal., Eq. S-10-C, consent decree 1930.
1932— 6. *United States* v. *Fox West Coast Theatres*, S.D. Cal., Eq. Y-38-H, consent decree 1932.
1936— 7. *United States* v. *Warner Bros. Pictures, Inc.*, S.D. N.Y., Eq. 82, 206, 1936.
1936— 8. *United States* v. *Interstate Circuit, Inc.*, 306 U.S. 208.
1939— 9. *United States* v. *Griffith Amusement Company*, Civil 172, W. D. Okla., 334 U.S. 100.
1939—10. *United States* v. *Schine Chain Theatres, Inc.*, 334 U.S. 110.
1939—11. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173.
1940—12. *United States* v. *Barney Balaban et al.*, Criminal No. 31230, December 10, 1940, District Court of the United States, Northern District of Illinois.
1948—13. *United States* v. *Paramount*, 334 U.S. 131.
1950—14. *Milgram* v. *Loew's*, 192 F. 2d 579.

In 1934 the National Recovery Review Board, created by an Executive Order, referring to respondents, reported that "Monopolistic practices in this [motion picture] industry are bold and aggressive and its small enterprise is cruelly oppressed." (*Report of the National Recovery Review Board on the NRA Motion Picture Code*, May 4, 1934,

Clarence Darrow, Chairman; Library of Congress.) In 1934, in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186, this Court was moved to notice this "proclivity for unlawful activity" of these respondents. Again, in 1948, in *United States* v. *Paramount*, 334 U.S. 131, 147-148, the Court adverted to the same "proclivity to unlawful conduct".

General denials. In its opinion, the district court stated: "It was the positive testimony of the sales representatives of all the defendants that other producers or exhibitors were not consulted" (R. 153), and "Inference from similarity loses its importance when met by positive denials of such action." (R. 135) The denials referred to were of no value whatsoever. As few as five film companies controlled the exhibition business in Los Angeles, especially the "cream" first run business—Fox, Loew's, Warner, RKO and Paramount. This concentration made concerted action far from difficult. Five men in New York could, and undoubtedly did, determine who should be admitted to the business in Los Angeles, and upon what basis as to run, availability and otherwise. Respondents' Los Angeles sales employees testified that decisions as to licensing pictures were not made by them, but by company officials at the home offices in New York City. (R. 175-176, 720-723, 1467, 1498, 1765, 3416, 3419, 3461, 3475-3478, 3521, 3523, 3537, 3609.) There was no testimony that they were present or participated in the decisions. With two exceptions, no official of high rank in any of the companies appeared. The RKO sales manager from New York, was one exception. He testified that decisions on licenses were made at the New York RKO office, but gave no further information, and made no denial of concerted action among the companies. The highest ranking officer of Fox West Coast Theatres was the other exception; but he made no denial of concerted action between his company and the other appellees. (R. 3628.)

The only denials of concerted action recorded in the testimony, are those of the Fox sales manager, and of the Los

Angeles branch managers of Columbia and Paramount. They denied merely that they, personally, had any discussion or talk with any other company in determining the 21 days availability to which the Baldwin theatre was relegated. (R. 3617, 3467, 3468, 2866.)

Not only, therefore, did the district court use meaningless denials to rebut concerted action, but it ignored the very strong evidence of concerted action arising from the absence and failure to testify of those who knew and who were obviously the conspirators.

The men who made the denials were, as to licensing pictures, hardly more than glorified correspondence clerks. Their functions were almost wholly confined to the receipt of requests for pictures from exhibitors, the transmission of the requests to the New York offices of respondents; the relaying of the denials to the disappointed exhibitors; the storage, delivery and return of the films, and possibly also the collection of the film rentals from exhibitors.

Denials of concerted action by local sales employees and the absence of the real actors, of those who had authority and were in a position to know, has been the procedure of respondents in similar cases. Of that procedure, in *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-226, 1939, this Court said:

> When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pur-

> suance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.
>
> *Milgram* v. *Loew's,* 192 F. 2d 579, 584, CA 3, 1951.

In *Local 167* v. *United States,* 291 U.S. 293, 298, 1934, the Court said of similar silence by alleged conspirators:

> They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them.

In accepting general denials of conspiracy and a presumption of cessation of conspiracy upon the entry of the judgments in the government case, as full rebuttal of the prima facie evidentiary effect of the judgments, the district court has decided, in effect, that when such judgments have been received in evidence all requisite deference to section 5 of the Clayton Act has been given, and there is no requirement that they be given any evidentiary value as against other evidence. This, of course, vitiates the remedial purpose of the statute.

The truth is, the judgments in the *Paramount case* are of very great intrinsic weight. There can hardly be any question as to the credibility of judgments used as prima facie evidence in a private antitrust suit, as in the case of human witnesses. The judgments in the *Paramount case* were not consent judgments. They were entered after a long, careful, plenary trial, upon voluminous accurate documentary evidence of the conduct of respondents over many years. Respondents enjoyed full opportunity to contest the government suit, in the trial court and in this Court. Numerous mature, industrious and skillful counsel

(the reported opinions enumerate twenty-nine), including leaders of the American bar, defended them. The decisions against them were concurred in by eleven judges of this Court and the district court. That the great intrinsic effect of the judgments could not in reality have been overcome by the rebuttal in this case, is indicated by the fact that had that rebuttal been included in the *Paramount case*, the decisions in that case would not have been changed.

The decision is also in conflict with *Emich* v. *General Motors*, 340 U.S. 558. In that case this Court reversed a decision of the court of appeals which so severely limited the means permissible for ascertaining the particular matters established *prima facie* by a judgment in a government antitrust suit, as to render the judgment of no assistance to the private suitor, thus defeating the purpose of section 5 of the Clayton Act. The decision of this Court clearly implies that such a judgment is not to be reduced, as was done in this case, to merely nominal significance in the private suit.

This nullification of the benefit and authority of the *Paramount* and *Emich cases* and of section 5 of the Clayton Act in the ninth circuit will make it impossible for any motion picture exhibitor injured by reason of the conspiracy and restraint in the Paramount case, to prevail in any suit for damages or injunction, now pending or hereafter instituted in that circuit, against the major picture distributors. To that extent and in a large area of the country, the decision of the district court will vitiate a great public policy. The treble damage section of the Sherman and Clayton Acts and the section for assisting private suitors with judgments in government cases, were enacted as aids in the achievement of the objects of the antitrust laws, and, with suits by the Attorney General for injunction and criminal prosecutions, constitute one of the three principal and co-equal methods provided by Congress for protection of the public against the formidable evils of restraints of trade and monopoly.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743, 751.

So, also, the decision of the district court will make it difficult, probably impossible, to enforce in that circuit the prohibitions of the judgments in the *Paramount case* intended to end the conspiratorial run and clearance system as well as the many other restrictive practices imposed on independent exhibitors.

Individually reacting to similar conditions as the cause of the restraint. It was undisputed that, prior to the entry of the judgments in the *Paramount case,* in the exhibition business at Los Angeles there was and long had been an almost complete limitation of the first run business to respondents; that there was a system of runs, clearances and fixed admission prices for the use of pictures, in which practically every theatre was classified in a fixed position as to run and clearance, and in which in every instance respondents were given the valuable and preferential positions; and that the first run limitation, the system of runs, clearances, and admission prices, had been effected by unanimous refusals of respondents to license pictures on any other basis.

It was undisputed that the same condition existed after the entry of the judgments—the dates thereof being November 8, 1948, March 3, 1949, February 8, 1950, January 4, 1951, and June 7, 1951. Although the conspiracy as to first runs was held unlawful, no injunction as to first runs was entered. As to admission prices, the prohibition was limited to fixing admission prices by contracts for pictures. Moreover, unlawful holdings of theatres, found to be inducements, aids and incentives to the conspiracy and monopoly, and the existence and unlawful use of buying power to suppress competition, although required to be dissolved, were not required to be dissolved until two and five years after the judgments—some not until as late as 1955.

While it was undisputed that the cause of the restraint, prior to the judgment, was conspiracy and monopoly, the

trial judge found that the cause of the same restraint and of the exclusion of the Baldwin, after the judgments, was "fortuitous" and "the result of each distributor defendant individually meeting, on economic and other reasonable grounds, similar situations in a similar manner." (R. 148, 187-188)

That conspiracy should thus cease to be the cause upon entry of the judgments, and that individual action should immediately supplant conspiracy and begin and continue to be the cause thereafter, is incredible! It is more incredible still, when it is realized that, on this theory, the change of causes began as to RKO on November 8, 1948, as to Paramount on March 3, 1949, as to Universal, Loew's and others, in part on February 8, 1950, and in part on January 4, 1951, and as to Fox on June 7, 1951. As the record does not contain the judgment against Fox, strictly speaking, there is no evidence at all of any change as to Fox. Economic phenomena and processes do not occur, move and react to produce results and conditions with any such instantaneous rapidity, but evolve, change and produce new conditions only gradually and over a protracted period. The witnesses who testified that individual action was the cause—Los Angeles local sales employees of respondents—asserted no such change and made no distinction as to the time when conspiracy ceased and individual action began.

This case has its counterpart in *Goldman Theatres* v. *Loew's*, 150 F. 2d 738, 742, CA 3, and *Milgram* v. *Loew's*, 192 F. 2d 579, CA 3, in which Goldman and Milgram were excluded from first runs at Philadelphia and Allentown, by unanimous refusals of respondents, at Philadelphia for the benefit of Warner, and at Allentown to favor a large theatre combination. In the Goldman case the district court held that the exclusion was not caused by conspiracy, but the court of appeals held that the unanimous refusals "could not possibly be sheer coincidence," and reversed the judgment. In the Milgram case, the same court of appeals affirmed findings that the refusals were the result of con-

spiracy, especially when viewed against the background of *United States* v. *Paramount,* 334 U.S. 131, and the "past proclivity" of these respondents to unlawful conduct.

Concurrence of conspiracy and unreasonableness and injury as the rule of decision. If there was a conspiracy to refuse to license pictures to petitioner for first run use in the Baldwin theatre, it was unlawful in and of itself, and the reasonableness of the conspiratorial refusal on the ground of necessity or on so-called economic and business grounds, is immaterial.

United States v. *Paramount,* 334 U.S. 131
United States v. *Schine,* 334 U.S. 110
United States v. *Columbia Steel Co.,* 334 U.S. 495, 522
Bigelow v. *RKO,* 327 U.S. 251
Associated Press v. *United States,* 326 U.S. 1, 11
Fashion Originators' Guild v. *FTC,* 312 U.S. 487, 461, 467-468

The district court in this case said:

> No cases exist which hold that the system, in itself, is a violation of antitrust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preferences. (R. 132)

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

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April, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 708.

FANCHON & MARCO, INC.,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 708.

FANCHON & MARCO, INC.,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Petition Does Not Present a Case Requiring or Deserving a Review by This Court Before a Hearing or Judgment by the Court of Appeals.

An appeal in this case by petitioner has been docketed in the Court of Appeals for the Ninth Circuit; briefs have been filed and the matter is ready for argument there. At this point petitioner has invoked this Court's admitted but wisely self-restricted power to by-pass the Court of Appeals by granting certiorari before judgment therein. The petition nowhere sets forth any reason purporting to justify this request, involving as it does

"a power not ordinarily to be exercised," and then only "for some compelling reason of wise judicial administration." (*The Three Friends,* 166 U. S. 1, 49; Frankfurter, J., concurring in part and dissenting in part in *Stainback v. Mo Hock Ke Lok Po.,* 336 U. S. 368, 384.) We submit that no such reason exists.

This is a purely private lawsuit involving primarily contested questions of fact. It presents no issues of important constitutional significance or imperative national concern, the existence of which have impelled this Court to forego the benefit of a Court of Appeals review in a limited number of cases. *Cf., Youngstown Steel Co. v. Sawyer,* 343 U. S. 579 (nationwide steel strike); *United States v. United Mine Workers,* 330 U. S. 258 (nationwide coal strike); *Ex parte Quirin,* 317 U. S. 1 (military trial and sentence of Nazi saboteurs); *Carter v. Carter Coal Co.,* 298 U. S. 238 (constitutionality of Bituminous Coal Act); *Railroad Retirement Board v. Alton R. Co.,* 295 U. S. 330 (constitutionality of Railroad Retirement Act); *Norman v. B. & O. R. Co.,* 294 U. S. 240 ("Gold Clause" cases); *The Three Friends,* 166 U. S. 1 (political and diplomatic relations with Spain just prior to the Spanish war); see *Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States,"* Sec. 131, pp. 234-237. There is no call here to interfere with the ordinary and orderly processes of judicial review.

On the other hand, the nature of this case makes such processes eminently desirable. Petitioner's stated reason for allowance of certiorari is the existence of a conflict

between the decision of the District Court and the decision in *United States v. Paramount,* 334 U. S. 131. Petitioner grounds the existence of such conflict upon the claim that this case was decided "on facts almost identical with those in the *Paramount* case." (Pet. 17.) Petitioner's statement of what the instant facts are, upon which such claim of conflict must be based, is a far cry from the facts which the evidence showed and the District Court fund. We respectfully submit that this Court should not dispense with the benefit of a careful judicial review by the Court of Appeals of the ten-volume printed transcript of 4108 pages and the 227 exhibits constituting the record of a seven-weeks' trial. This Court is entitled to the Court of Appeals' appraisal of the facts disclosed by the voluminous record and of the law as applied thereto. We are convinced that such review and appraisal will amply demonstrate the absence of any conflict between the decision here and that in the *Paramount* case or in any other case, and thus obviate further proceedings. We submit that this is a case in which such review ought to go forward and that this Court should deny the petition on the ground that the application has been made prior to judgment by the Court of Appeals. (*Saxe v. Anderson,* 302 U. S. 688.)

II.

Contrary to Petitioner's Statements, the Evidence Shows That Theatre Ownerships and Distribution Practices Have Changed Substantially Since 1945, the Date as of Which the Findings Were Made in United States v. Paramount. The Findings of the District Court That in 1949, 1950 and 1951 Respondents Have Not Engaged in Monopolistic or Conspiratorial Practices in the Distribution and Exhibition of Motion Pictures in the Los Angeles Area Are Supported by Substantial Evidence and Are Clearly Correct.

The facts as stated in the petition are in many respects at variance with the evidence and the Trial Court's findings. [R. 171-200.] By misstatement of some facts, by only partial statement of others, and by lifting quotations out of context, particularly with respect to certain remarks of the Trial Court, the petition creates an entirely erroneous impression of the Record. Space limitations of this brief make it impossible to call attention to every erroneous or unfair statement in the petition.

Petitioner was the operator of a circuit of theatres,—3 in Los Angeles and 25 in St. Louis. It was closely associated with corporations which operated 13 other theatres in and about Los Angeles. Petitioner and those corporations had officers, directors and stockholders in common and were represented by the same individuals in the licensing and booking of pictures. [Exs. A and B, R. 805; 384, 386, 783-784, 787, 986, 1098, 3287-3291, 3648-3650.]

Respondents (using the names under which they are commonly known) are Paramount, Loew's, RKO, Universal, United Artists, Twentieth Century-Fox and Fox

West Coast. Neither Columbia nor Warner Bros. was a party to this action at the time of trial.

On August 10, 1949, petitioner opened the Baldwin Theatre. The Baldwin is a neighborhood theatre in a new subdivision project on the northerly slopes of the Baldwin Hills, an undeveloped area near the fringe of the urban core of Los Angeles. There are a few business establishments in the vicinity of the Baldwin,—a market, some small shops and a drive-in restaurant, but there is also much vacant property in the area. [R. 2875-2878, 2900, 2904-2905, 2918-2919, 2555, 2457, 3259-3260, 2877, 2915; Ex. 29A, R. 1187; Court's Ex. 1, R. 423.]

A. Licensing of First Runs.

Petitioner complains of the refusal of respondents Paramount, Loew's, RKO, Universal, United Artists and Twentieth Century-Fox to license pictures first run to the Baldwin and contends that their refusals were the result of conspiracy,—a continuation of the same national conspiracy as was found in *United States v. Paramount,* to have existed in 1945. [Findings of Feb. 8, 1950, Ex. 47, R. 1595.] Petitioner contends that "precisely the same practices, acts, ownerships and relations have continued without interruption." (Pet. 2-3.) The evidence and the Trial Court's findings based thereon show that petitioner's contentions are without merit.

The evidence clearly shows how each distributor, acting individually, licensed its pictures first run since the opening of the Baldwin Theatre, and why it followed a particular practice. Petitioner states "Only for theatres owned by corporations controlled by respondents have licenses for the first exhibition of pictures at Los Angeles been granted by distributors" and that respondent

distributors enforced "a limitation of first runs to their controlled theatre corporations" (Pet. 5, 13), thus seeking to create the impression that all of respondent distributors engaged in a continuing practice of licensing their pictures to theatres operated by their subsidiaries or affiliates. Both the statement and the impression sought to be created are contrary to the evidence.

Since prior to 1942 petitioner has operated the Downtown Paramount Theatre and the Hollywood Paramount Theatre. During the period involved in this action every Paramount picture, with one exception, was exhibited first run by petitioner itself exclusively in those two theatres.[1] [Ex. Z-1, R. 2311; 181-182; 781, 782; 382-383.]

Except for the first few months after the opening of the Baldwin Theatre, respondent Loew's licensed all of its pictures first run during the period involved in this action to theatres operated by one or more of the following independent exhibitors, all of which were unaffiliated with any distributor: United Artists Theatres Circuit,[2] Metropolitan Theatres Corporation, Galston & Sutton and Sherrill Corwin. Such theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. [Ex. Z-2, R. 2314, 3108-3109; 3262, 3116, 767-769.]

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[1]Prior to December 31, 1949, respondent Paramount had an ownership interest in these two theatres, but they were operated by petitioner and respondent Paramount had no control over them. On December 31, 1949, respondent Paramount's ownership interests in those theatre properties were transferred to United Paramount Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [R. 2381.]

[2]Petitioner attempts to leave the inference that United Artists Theatres Circuit, to which respondent Loew's licensed some of its pictures first run, is not an independent exhibitor. United Artists Theatres Circuit never has had any connection with respondent United Artists Corporation. Since November, 1949, it has been an independent unaffiliated operator of a circuit, just as petitioner is an independent unaffiliated operator of a circuit. [R. 3495.]

During the period involved in this action RKO licensed most of its pictures first run to the RKO Hillstreet in Downtown Los Angeles and the Pantages Theatre in Hollywood. Both of these theatres were operated by RKO until December 31, 1950, at which time they were transferred to RKO Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [Ex. Z-3, R. 2316, 3297; 3316-3317.]

During the period involved in this action Universal licensed its pictures first run to the United Artists Theatre in Downtown Los Angeles and to theatres in Hollywood and the Wilshire District. It also licensed pictures to the Studio Theatre near Universal City, and sometimes to the Culver Theatre in Culver City. Since December, 1949, the United Artists Theatre has been operated by United Artists Theatres Circuit, an independent. The other theatres (and the United Artists Theatre prior to December, 1949) were operated by Fox West Coast, a subsidiary of Twentieth Century-Fox. [Ex. Z-4, R. 3402-3404, 3107, 3116, 3495, 1460.]

Prior to May, 1950, respondent United Artists (not connected in any way with United Artists Theatres Circuit) licensed its pictures first run in three theatres operated by an independent exhibitor unaffiliated with any distributor.[8] These theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. In May, 1950, this independent exhibitor changed its policy and was no longer desirous of playing United Artists pictures first run. Thereafter United Artists obtained first run playing time in whatever theatres it could interest

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[8]Although respondent United Artists had a landlord interest in these theatre properties, the theatres themselves were operated and controlled by independent exhibitors. [R. 2198, 767-769, 3077.]

in its pictures in Downtown Los Angeles and Hollywood. A number of its pictures were licensed first run to the Downtown Paramount and the Hollywood Paramount, operated by petitioner. [Ex. Z-5, R. 2318; 3530-3534; 3495; 767-769; 2198; 3502-3504.]

Thus, it is not a fact that first runs were confined to theatres operated by subsidiaries or affiliates of distributors. Many first runs were licensed to independent exhibitors.

Respondent Twentieth Century-Fox, to which the judgment of February 8, 1950, in *United States v. Paramount* was applicable,[4] acting independently, continued thereafter and during the period involved in this action to exhibit its own pictures first run in the theatres operated by Fox West Coast, its wholly-owned subsidiary, but that was pursuant to a right expressly recognized and reserved to it in that judgment. Paragraph V of the judgment of February 8, 1950, stated:

> "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all of the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be

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[4]Petitioner stated that "A final judgment against the Fox defendants in the government suit was not entered until June 7, 1951." (Pet. 7 and 11.) The statement is in error. A final judgment was entered against the Fox defendants on February 8, 1950. [Exs. 47 and 48; R. 1595.]

satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries." [Ex. 48.]

Since vertical integration is not illegal *per se* (*United States v. Paramount,* 334 U. S. 131, 173), the fact that respondent Twentieth Century-Fox favored its own theatres as first run outlets in accordance with a right so to do expressly recognized and preserved in the judgment in the government case is not evidence of conspiracy or monopoly. (*Dipson Theatres v. Buffalo Theatres* (2nd Cir.), 190 F. 2d 951, 960, cert. den. 342 U. S. 926.)

B. Licensing of Subsequent Runs.

Since 1945, the date as of which the findings were made in *United States v. Paramount* after remand [Findings of Feb. 8, 1950, Ex. 47; R. 1595], there have been many changes in the methods of the respective distributors in distributing motion pictures in the Los Angeles area. Not only have first runs been frequently licensed to independent exhibitors, but the method of licensing subsequent runs has undergone profound changes. If there ever was a fixed system of runs and clearances in the Los Angeles area, it had ceased to exist by the time petitioner's Baldwin Theatre opened on August 10, 1949. Each of respondent distributors has made its subsequent run pictures available to any theatre which desired them, regardless of past relationship or ownership. [Ex. AW, R. 2637; Ex. AX, R. 2653; Ex. AY, R. 2654; Ex. BR, R. 3381; Ex. BU, R. 3417; Ex. BI, R. 3129; R. 2469-2472, 2637-2662, 3317-3319, 3380-3381, 3417-3422.] The

Trial Court summarized these changes in its opinion. [R. 159.] Remarking on these changes, the Trial Court said:

> "Consequently, we are not confronted with a situation that is static, or is brought about by design or concert on the part of the defendants to keep it so by illegal means. We are met with a situation which is *in flux* and which must be considered, not in the light of what the particular defendants may have done before the courts interdicted certain of their practices, but in the light of what they have done since and are doing today." (Italics ours.) [R. 162.]

C. Changes in Theatre Ownership of Fox West Coast.

With respect to the theatre ownerships of respondent Fox West Coast, the record shows that numerous changes occurred between 1945 and the date of the opening of the Baldwin Theatre. Petitioner makes many inaccurate and incorrect statements with respect to the theatre ownership of Fox West Coast. The record shows that between December 31, 1946, the date of the Trial Court's first decision in *United States v. Paramount* [R. 3074, Ex. BG], and the date of trial in the case at bar, the number of Fox West Coast theatres in Los Angeles County was reduced from 131 to 91, a reduction of about 33%. The Trial Court was sufficiently impressed with the diminution in size, power and number of theatres operated by Fox West Coast following the divestiture orders in the decree of December 31, 1946, that he devoted several pages of his opinion to this evidence. [R. 158-162.]

D. Reasons for Licensing First Runs in Downtown Los Angeles, Hollywood and Sometimes the Wilshire District.

All of the distributors licensed their first runs to theatres in the Downtown and Hollywood areas of urban Los Angeles. Some, but not all, of the distributors, such as Loew's (for a time), Twentieth Century and Universal, regarded the Wilshire District as being of such importance as an urban center that they sought an additional first run outlet in the Wilshire District. [Ex. Z-2, R. 2314; Ex. Z-4, R. 2317; R. 1218-1219, 812-814.]

The two great centers of urban Los Angeles are Downtown Los Angeles and Hollywood. [R. 2878-2880.] The geographical and population characteristics of Los Angeles and the importance of that city in the motion picture world make it essential that every distributor show its pictures first run in the two great urban centers —Downtown Los Angeles and Hollywood Boulevard. There was no dispute about this. Marco Wolff, Vice-President of petitioner, testified:

> "Q. Leaving aside the so-called class pictures,[5] it is good business policy, is it not, Mr. Marco, in

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[5]"Class" or "art" pictures are pictures which appeal to a special segment of the population,—usually the so-called "intellectuals." They are given special treatment. It has been found that the best results are obtained if they are played first run in one small theatre for a long period of time. Certain small theatres such as the Four Star and the Beverly Canon (operated by independent exhibitors), and the Fine Arts (operated by Fox West Coast), have built up a reputation of playing these intellectual type pictures and the proper distribution of such pictures requires that they be licensed first run to a theatre of that type. "The Magnificent Yankee," depicting the life of Mr. Justice Holmes, is a good example of a "class" picture and it was played first run in the Four Star Theatre. The Baldwin, by reason of its size, type and location, was unsuitable as an "art" theatre. [R. 2397-2400, 3127, 818.]

the ordinary class or run of pictures, that those pictures should be exhibited at least in Hollywood and downtown? A. Which pictures?

Q. The ordinary run of pictures. A. Yes, it is good business.

Q. It is important that they should be exhibited in those two areas, is it not, to be successful pictures? A. I would say so.

* * * * * * * *

Q. And because of the importance of Hollywood, particularly, and Los Angeles in the film world, it is important to the success of pictures that they get shown in those two places, isn't it? A. I think so." [R. 818, 819.]

The reasons for playing pictures first run in the Downtown and Hollywood areas are fully set forth in the evidence. [R. 2371-2372, 2378-2379, 2627-2628, 3125-3126, 3297-3298, 3407.] The theatres in those areas are located in great business and shopping centers. These centers with their important stores, fine hotels and restaurants, intriguing window displays and bright lights, generally attract crowds. That is the reason there are so many theatres, most of them of a de luxe character, clustered in these two areas. There is much pedestrian traffic passing them. [R. 3126.] They are able to operate matinees, as well as evening performances. [R. 2376-2377.] The reason that they are able to operate matinees is that these important shopping centers attract large daytime crowds that drop in to the theatres for the matinee.

The persons who patronize the Downtown, Hollywood and Wilshire District theatres come from all parts of the Los Angeles metropolitan area and if a picture is well

attended in the large de luxe theatres in those urban centers, its reputation spreads by word of mouth throughout the entire area. [R. 2428, 3298.] Thus, as the picture plays through successive runs, thousands of patrons will be waiting to see the picture in their neighborhood houses at lesser prices and at more convenient times, their interest having been stimulated by the "showcase" exhibitions in the great Downtown and Hollywood theatres. In order that the "showcase" runs may be successful (and thus "establish" the picture for subsequent runs) large sums are expended by the distributors for advertising, sometimes in excess of the returns received from the "showcase" exhibitions. [R. 2371, 3230.]

There are other reasons why it is essential that first runs be played Downtown and in Hollywood. The Los Angeles area is the motion picture capital of the world. The first run showings here are "covered" by columnists and feature writers whose observations and reviews are published nationally. Unless the first run showings are well attended and successful, adverse publicity on a national scope might follow. And, to the contrary, successful first runs in this area commend favorable publicity on a national scope. [R. 2371.]

Furthermore, the showcase theatres pay large film rentals and they can afford to pay such rentals because they have the right to play the first runs with clearance over other theatres in the competitive area. [R. 2371.] All of Los Angeles County, except the Long Beach-Wilmington-San Pedro area and the Pomona area, is competitive, on a first run basis, to Downtown Los Angeles and Hollywood. That is to say, people from all of Los Angeles County (with those exceptions) attend the great showcase theatres in the two

principal metropolitan entertainment centers, Downtown Los Angeles and Hollywood. [R. 2435-2436.] There may not be great numbers from any one area of the county, but altogether the suburban areas contribute a substantial portion of the patronage of the showcase theatres. [R. 3244-3245.] Petitioner's answers to interrogatories and Marco Wolff's testimony are in accord with these statements. [R. 3652, 904-907.] It is a principle of economics in the business of distributing motion pictures recognized by all (including Marco Wolff) that the earlier the run, the greater the area of competition. [R. 907.] Thus, the area of competition for first run is almost county-wide whereas the area of competition for subsequent runs is smaller. [R. 907, 916-918.] The result of these "facts of life" in the business of distributing motion pictures is that the licensing of additional first runs in the competitive area tends to dilute the patronage of the "showcase" theatres, which, in turn, decreases their ability to pay large film rentals and to contribute toward the extensive advertising and exploitation a picture receives on its first release.

In addition to the many theatres clustered in the Downtown and Hollywood areas (and to a lesser extent in the Wilshire District) there are a large number of other theatres in the Los Angeles urban area, as well as in the surrounding suburban communities. These theatres are scattered, not grouped, because each is necessarily located to provide for the theatre patrons in its own segment of the entire Los Angeles urban area and is dependent upon those patrons for its success. We say "necessarily" because these segments of urban Los Angeles entirely lack the elements possessed by the Downtown, Hollywood and Wilshire areas which draw people to them from all sec-

tions of the Los Angeles metropolitan area regardless of the theatres. In the Downtown, Hollywood and Wilshire Districts the theatres undoubtedly *enhance* the inflow of people, but they did not and do not *create* it. People come from great distances, drawn by the individual and combined attraction of stores, hotels, restaurants, amusements and bright lights. To the contrary, the Baldwin Hills area, as such, presents no magnetic attraction whatsoever. Such few business establishments as exist in the vicinity of the Baldwin Theatre exist for the convenience of the inhabitants of the immediate neighborhood.

A "neighborhood theatre" such as the Baldwin is generally unsuitable as a "showcase" to "establish" a picture and cannot be expected to produce revenues comparable with theatres in the Downtown, Hollywood or Wilshire Districts. Such a theatre starts with an insurmountable handicap of location. It must, alone and unaided, draw patrons to otherwise unimportant and unimpressive surroundings; whereas, the theatres in the major urban centers need only to capitalize upon the natural desire of the public to "see the town."

It was for these, and other valid business reasons thoroughly demonstrated by the evidence, that the majority of the distributors, acting individually, required that their pictures receive first run exhibition in the Downtown and Hollywood areas (and on occasion in the Wilshire area) and refused to dissipate their value by exhibiting them on that run in neighborhood theatres.

We do not conceive it to have been the purpose of this Court in *United States v. Paramount* to require the defendants to jettison sound business judgment in selecting the means for best exploiting and selling their pictures,

to ignore the undisputed economics of motion picture distribution and, like a public utility, to license their product to any theatre making demand, regardless of location, appointments, financial responsibility or reputation for showmanship. Yet that in its final analysis is the predicate upon which the Petition before the Court proceeds and upon which petitioner concludes that the decision and opinion of the District Court conflicts with the opinion of this Court. The Baldwin Theatre was denied first run; ergo the defendants have violated the antitrust laws.

Experience has demonstrated and common sense dictates that a sequence of exhibition of a picture in an area, first in large, centrally located theatres and subsequently in local and suburban theatres enables more people to see it, at times which suit them, at prices which they can afford and at theatres in their own locality. This "staggered distribution" referred to by the trial judge in his opinion inevitably necessitates that some theatres be preferred as to run over others. The selection of large, centrally located Downtown, Hollywood and Wilshire District theatres for their initial releases in preference to more remote neighborhood theatres can hardly be condemned as illegal; but if it were the Baldwin Theatre has no claim to preference of treatment over other similarly situated neighborhood theatres. In fact, as the evidence showed and the trial judge observed, the Baldwin Theatre was "notoriously a 'bad' producer of revenue in the 21-day group." [R. 158.]

E. Clearance of First Runs Over Subsequent Runs.

Petitioner states that "three clearances have applied in favor of first run against the second run theatres—7, 14, and 21 days," and that second run theatres are "classified" as to these clearances with the clear inference that such "classification" is arbitrarily manipulated to favor Fox West Coast and to relegate the Baldwin to the lowest position in the scale. (Pet. 5-6.) Petitioner's statement and the inferences therefrom are erroneous and highly misleading as demonstrated by the record and findings.

Petitioner constructed its Baldwin Theatre within the urban core area of Los Angeles, from which area the showcase theatres may be expected to draw their greatest patronage. The earliest availability after first run afforded any of the theatres in that area, a number of which are larger and as fine as the Baldwin, is 3 weeks or 21 days. Every distributor offered the Baldwin such availability, equivalent to the best offered other theatres in the same urban area whether operated by Fox West Coast or by independents. By petitioner's own testimony that availability and the consequent clearance given first run was entirely reasonable and in accordance with the requirements of *United States v. Paramount.* Harry Arthur, Jr., President of petitioner, admitted that a 21 day clearance for the Baldwin Theatre was "not unreasonably long." It was his view that even a longer clearance in favor of the first run theatres would be reasonable. His testimony is quoted in the Trial Court's opinion [R. 153-156] and can also be found in the Transcript. [R. 3548-3555.]

reasonable grounds, similar situations in a similar manner." [Findings 15, 22 and 26; R. 187, 192, 194.]

On the issue of conspiracy, respondents introduced evidence explaining why each respondent distributed pictures in the manner shown by the evidence and denying that the manner of distribution followed was the result of conspiracy. Petitioner states "The men who made the denials were, as to licensing motion pictures, hardly more than glorified correspondence clerks." (Pet. 22.) Petitioner's statement is contrary to the evidence. For Paramount, Loew's, RKO, Universal and Twentieth Century-Fox, the Western Sales Managers testified. They were the executives in charge of distribution in the Western States. Two had their headquarters in New York; the other three had their headquarters in Los Angeles. These executives not only were the executives who knew why the particular distributor licensed pictures as it did in the Los Angeles area; they were the men who decided what availability should be accorded to the Baldwin. They testified why they had reached their decisions and the reasons given by them had nothing to do with conspiracy or agreement. They were business reasons—reasons which grew out of the obligations imposed by the decisions in *United States v. Paramount* and out of the economics of the distribution of motion pictures as applied to the geographical situation, population habits and physical facts in the Los Angeles area. In some instances the decisions of these executives were subject to approval of lawyers and other executives. But in no instance was the judgment of the other executives substituted for the judgment of the executives who had studied the situation, knew the facts and reached a considered conclusion as to what his company should do. These

executives denied joint action. But more persuasive than these mere denials are the reasons which they gave for their decisions and the correspondence written before there was any lawsuit, which shows beyond any reasonable doubt that the determinations made by the respective distributors as to the playing position to be accorded the Baldwin were made individually, in each instance, for legitimate and even compelling business reasons. Their whole course of conduct and the legitimacy and reasonableness of the decisions which they reached show beyond any reasonable doubt that conspiracy, agreement and concert of action were not involved.

The decision in *Interstate Circuit v. United States,* 306 U. S. 208, has no application to the case at bar. There, Interstate Circuit made most extraordinary demands upon the branch managers of the distributor-defendants. These demands were not considered or acted upon by the branch managers, but were referred to executives for decision. The distributor-defendants uniformly agreed to the demands and from this uniformity in what was considered an unreasonable position, the lower court inferred conspiracy. Defendants did not offer any explanation of "the singular unanimity of action on the part of the distributors" (p. 223). No one who had anything to do with the distributors' decisions on the Interstate Circuit demands was called as a witness. The Supreme Court held that *in the absence of any reasons* why the defendants, acting individually, would unanimously agree to such extraordinary demands as were presented by Interstate Circuit, the Trial Court was justified in inferring that defendants acted by agreement and that this inference was supported and strengthened by the fact that the distributors failed to call any witness who

knew, or was in a position to know, whether any agreement had been reached among them for concerted action (p. 225). In the case at bar, the reasons for the individual acts of the distributors were fully explained by executives who made the decisions.

III.

If the Judgments in United States v. Paramount Constitute Prima Facie Evidence of Conspiratorial Action Against the Baldwin Theatre, Such Prima Facie Evidence Was Overcome by Affirmative and Convincing Evidence.

Under Section II of this Brief we have pointed out that since the decision of the Expediting Court which was affirmed in part and reversed in part by the Supreme Court, theatre ownerships have changed, substantial changes have been made in the method of distribution, and that it cannot be said that during the operation of the Baldwin Theatre respondents maintained a fixed system of runs and clearances. In its opinion the Trial Court said that since 1945 the practices of distribution in the Los Angeles Area have been *"in flux."* [R. 162.] Addressing itself to the period involved in this action, the Trial Court found that "None of the distributor defendants has established or maintained or does now maintain a fixed or rigid system of runs or clearances in the Los Angeles area. Each distributor during the entire period since at least June 11, 1946, has, acting individually, made constant changes, increasing in number, in the availabilities and clearances over theatres in the Los Angeles Area." [R. 193.] The Trial Court based its findings upon affirmative and convincing evidence that each distributor, in determining the playing position of the Baldwin Theatre, acted individually and without conspiracy

with any other distributor or exhibitor. If the judgments in *United States v. Paramount* constituted *prima facie* evidence of conspiratorial action during the operation of the Baldwin Theatre (which we deny), the effect of those judgments was overcome by evidence which convinced the Trial Court.

Actually, such of the judgments in *United States v. Paramount* as had the effect of constituting *prima facie* evidence under Section 5 of the Clayton Act did not constitute *prima facie* evidence that the conspiracy which was found to have existed in 1945 continued to exist in 1949, 1950 and 1951, nor did they constitute *prima facie* evidence that a conspiracy existed in the Los Angeles area. Their application to the issues in the case at bar was of a limited character. In the first place, those judgments did not adjudicate that there was conspiratorial conduct in any specific city or locality. Petitioner seeks to create the impression that those judgments adjudicated that the distributor-defendants have acted in concert in their grant of runs and clearance *in Los Angeles,* in the formation of a uniform system of clearance *in Los Angeles,* and in exercising their power to fix runs and clearances *in Los Angeles* for the purpose and with the effect of excluding independents. (Pet. 8-11.) These assertions by petitioner are in error. In *United States v. Paramount* the Expediting Court did not find concert of action or establishment of a system of runs and clearances in any particular area or with respect to any particular theatres. It expressly left open the question of whether or not there was conspiratorial conduct in particular areas. The Expediting Court said in its original opinion, "The decisions of such controversies as may arise over clearances should be left open to local suits in the area concerned." (*United*

States v. Paramount, 66 Fed. Supp. 323, 342.) And when the Court made its findings in 1950, it refrained from finding concert of action or establishment of a system of runs and clearances in any particular area and continued to leave these questions open for determination in individual actions involving each local area. In the only decision of the Supreme Court which has construed the provisions of Section 5 of the Clayton Act giving *prima facie* effect to a final decree in a government suit, *Emich v. General Motors Corporation,* 340 U. S. 558 (1951), the Court expressly limited the *prima facie* effect of a prior government decree to those matters which were "distinctly put in issue and directly determined" in the prior government action. (340 U. S. at p. 569.)

In the second place, those judgments were not evidence that the conspiracy which was found to have existed in 1945, continued to exist in 1949, 1950 and 1951. The findings upon which those judgments are based expressly state that "Unless otherwise stated these findings show the situation in 1945." [Ex. 47.] All of the findings which petitioner quotes or cites speak as of 1945 (Pet. 8-10). The Trial Court noted that the judgments upon which petitioner relies spoke as of a time long prior to the opening of petitioner's Baldwin Theatre and stated:

> "* * * So we have to determine whether the practices which the decree in the Paramount case condemned, and which the plaintiffs sought to prove by evidence *aliunde,* have continued to the present time, whether they are the result of agreement, and whether the plaintiff has been damaged by them." [R. 134.]

After hearing all of the evidence relating to the period of time subsequent to the date as of which the decrees spoke, the Trial Court determined that:

> "Whatever may have been the practice of the defendants before the decree of the statutory court, it is quite evident * * * there has been an abandonment of the condemned distributing policies such as 'zoning,' 'block booking,' 'key deals,' and the like, a revision of clearances and the establishment of a system of picture by picture exploitation." [R. 147.][7]

The conduct of respondents must be viewed in the light of the changed situation in 1949, 1950 and 1951, and not in the light of the situation as it existed in 1945.

In *Emich v. General Motors,* 340 U. S. 558, plaintiff based his action upon the same acts which were made the subject matter of the prior government action, not on conduct of General Motors four or five years later. Since he relied upon the identical acts which were the subject matter of the prior government action, he was able to use the judgment in the prior government action for the purpose of minimizing the burdens of his private litigation. In the case at bar, where the acts upon which

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[7]Petitioner asserts that the distributors maintained "a structure of fixed admission prices for all of the theatres" and that it was "enforced by the distributors specifying in their licenses of pictures the minimum price to be charged by the exhibitors. on pain of immediate termination of the license, reduction in the clearance allowed, relegation of the offending exhibitor to a later run and refusal of future licenses." (Pet. 6.) Petitioner's assertions are without support in the record and are untrue. As a matter of fact, the complaint did not charge the distributors with attempting to fix admission prices and price fixing was not in issue. As the Trial Court said, "This is not a price-fixing case." [R. 163.]

petitioner relies occurred four or five years after the acts which were the subject matter of the prior government action, petitioner seeks to make use of the judgment in the prior government action by attaching to it a presumption that respondents continued to violate the anti-trust laws. This, as the Trial Court said, is not permissible. It is a well established principle of law that a party under restraint by court order will comply with that order. (*United States v. Hosteen Tse-Kesi,* 191 F. 2d 518, 520 [10th Cir., 1951]; *N. L. R. B. v. Lightner Publishing Corporation,* 128 F. 2d 237, 240 [7th Cir., 1942].) Under our system of jurisprudence, a party is not presumed to be guilty of contempt of court.

The three cases cited[8] by petitioner to the effect that a conspiracy, once established, is presumed to continue (Pet. 18) did not involve any injunction or decree of court requiring that the defendant cease the conspiracy. The one case[9] cited by petitioner to the effect that a judgment that parties have violated the anti-trust laws does not create a presumption that they have ceased the violation (Pet. 19) involved a criminal action under the anti-trust laws and did not involve any future restraint as to the defendants' conduct. Where, as in the case at bar, there was an injunction requiring respondents to cease and desist the conduct found to be in violation of the

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[8]*Marino v. United States,* 91 F. 2d 691, 695 (C. A. 9, 1937); *Coates v. United States,* 59 F. 2d 173, 174 (C. A. 9, 1932); *Hyde v. United States,* 225 U. S. 347.

[9]*Local 167 v. United States,* 291 U. S. 293 (1934).

anti-trust laws, there is no presumption that they defied the court. The presumption is to the contrary.

However, quite apart from any question of the correctness of the presumption to which the Trial Court adverted, it is readily apparent from the entire record that the Trial Court did not in fact base its findings upon the presumption. The Trial Court's findings were based upon the affirmative evidence in which witnesses for respondents testified in detail as to why they individually made their determinations with respect to the Baldwin's playing position. The findings are supported by substantial and convincing evidence which is summarized in Section II of this brief.

IV.

Petitioner Has Created an Erroneous Impression of Statements of the Trial Court by Lifting Them Out of Context.

Petitioner quotes the Trial Court as saying:

> "I don't conceive that there can be a possibility of free trade as to first run." (Pet. 12.)

Petitioner failed to quote the balance of the Court's statement showing what he meant by "free trade" and failed to quote counsel for petitioner's statement that he agreed with the Court. The entire discussion of "free trade" at that point was:

> "In other words, it is not enough for you to say that some other theatre is given a first run and you are not, because I don't conceive that there can be possibility of free trade as to first runs. In other

words, you can't say that all the theatres in Los Angeles shall have first runs at the same time.

Mr. Reich: No. With that I agree." [R. 1022.]

The nature of motion pictures is such that they must be licensed on a series of successive runs. All exhibitors cannot play the picture at the same time. Without exception every decision which has dealt with the questions of run and clearance in the distribution of motion pictures has recognized the propriety and economic necessity of licensing successive runs of pictures with a reasonable lapse of time between runs in theatres which are in substantial competition.[10] This method of licensing pictures means that some exhibitor plays first and some exhibitor plays second, and so on. [Tr. 178-179; 3229.]

In a discussion with counsel for petitioner, the Trial Court referred to the fact that some young lawyers who

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[10] *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 145 (1948);

Schine Theatres v. United States, 334 U. S. 110, 121 (1948);

United States v. Paramount (D. C. N. Y.), 66 Fed. Supp. 323, 342 (1946);

Chorak v. R.K.O. Radio Pictures, Inc. (9th Cir.), 196 F. 2d 225, 228 (1952) (cert. den. 97 L. Ed. 122);

Dipson Theatres, Inc. v. Buffalo Theatres, Inc (2nd Cir.), 190 F. 2d 951, 958 (1951);

Westway Theatre, Inc. v. Twentieth Century-Fox (4th Cir.), 113 F. 2d 932 (1940) (affirming on opinion below 30 Fed. Supp. 830, 834-835);

Gary Theatre Co. v. Columbia Pictures Corp. (7th Cir.), 120 F. 2d 891, 893-894 (1941);

Windsor Theatre Co. v. Walbrook Amusement Co. (4th Cir.), 189 F. 2d 797 (1951) (affirming 94 Fed. Supp. 388, 390).

were not economists had written articles condemning the anti-trust laws and that he himself had written an article in which he said that the goal of maintaining competition in a modern economic system could not be realized under the anti-trust laws. Petitioner quotes his statement out of context. (Pet. 11-12.) Read in context, it appears that the Trial Court's statement was as follows:

> "So the trouble with these articles is they are by young men who are not economists, who are lawyers, and they get mixed up in the economic details, which some of them do not understand. Chamberlin and all the others actually condemn the anti-trust law, as interpreted, just as your Professor Toulmin does. But I am not interested in the theory of economists. I am interested in the way the Supreme Court has interpreted it.
>
> "As a matter of fact, I can point to an article of my own, published in the Commercial Law Journal, in which I said that antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern industrial system. You can quote me against myself. But, as I told you, after 5:00 o'clock I can talk one way, but up to 5:00 o'clock I conform to what the law tells me to do." [R. 3978.]

As a matter of fact, Judge Leon R. Yankwich, Chief Judge of the Southern District of California, and Trial Judge in the case at bar, is an outstanding authority on

the anti-trust laws. He was a member of the committee of distinguished judges appointed by the Judicial Council of the United States to study and report on Procedure in Antitrust and Other Protracted Cases (13 F. R. D. 62). He has decided many important cases involving the anti-trust laws, including the following:

United States v. Standard Oil Co. (1948), 78 Fed. Supp. 850, affirmed 337 U. S. 293;

United States v. Richfield Oil Corp. (1951), 99 Fed. Supp. 280, affirmed 343 U. S. 922;

Balian Ice Cream Co. v. Arden Farms Co. Inc. (1950), 94 Fed. Supp. 796, 104 Fed. Supp. 796;

F. & A. Ice Cream Co. v. Arden Farms (1951), 98 Fed. Supp. 180;

United States v. Food and Grocery Bureau of Southern California (1942), 43 Fed. Supp. 974, affirmed 139 F. 2d 973;

United States v. Heating, Piping & Air Conditioning Contractors Association (1940), 33 Fed. Supp. 978.

An examination of the record, not only at the pages cited by petitioner (Pet. 11-12), but as a whole, will demonstrate that Judge Yankwich fairly and correctly applied the law to the facts and that his comments thereon were wise and appropriate. We submit that the implications created by petitioner's use of the Trial Court's comments out of context are unfair.

Conclusion.

It is respectfully submitted that no valid reason exists for by-passing the Court of Appeals, and that a review of the voluminous record will show that the Trial Court's findings are supported by substantial and convincing evidence and that they are clearly correct.

Respectfully submitted,

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